IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER DELVAILLE H. THEARD TO THE BRIEF OF THE SOLICITOR GENERAL OF THE UNITED STATES AND THE BRIEF OF THE COMMITTEE OF THE LOUISIANA STATE BAR ASSOCIATION.

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We beg to refer, at the outset of this reply brief, to the disbarment decision by the State Court (Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 310) and also to another decision, of equal authority and sanc-

tion, of the same Court (State v. Theard, 212 La. 1022, 34 So. (2d) 248).

The decision first mentioned decrees that petitioner should be disbarred, not on account of any criminal act, the Court declining to give consideration to any such act as charged by the Bar Committee, but solely and only because of an act committed during a period of insanity, which the Court concedes for the purpose of the decision.

The opinion of the Court in the other case holds that the acts of petitioner, complained of, were neither "intentional nor deliberate", but were caused by some "unfortunate circumstance" (petitioner's mental condition and illness) "over which he (petitioner) had no control".

The present disbarment action in the Federal Court against petitioner was based entirely on the State Court disbarment decree which in effect conceded insanity and which confirmed the other decision holding petitioner free of culpable fault.

It would seem that this action accordingly wholly fails to disclose a cause of action, since it is based exclusively on two State Court decisions, one conceding petitioner's insanity, and the other completely relieving petitioner of all culpability due to the unfortunate circumstance of his illness,—a situation beyond his control.

REPLY TO THE BRIEF OF THE SOLICITOR GENERAL.

(1)

The Solicitor General, at page 11 of his brief, cites two cases to show that insanity of a lawyer is not a defense to an action for disbarment.

If the Court will turn to page 15 (Section 3) of petitioner's brief, it will be seen that the two cases cited by the Solicitor General and all the other cases cited by the Bar Committee were analyzed fully by petitioner. In each of these cases, although insanity was claimed by the defendant, it was proved to the Court that each lawyer-defendant suffered from no condition affecting his judgment and responsibility and that the lawyer-defendant's wrongdoing had been willful and deliberate.

In the present unique disbarment decision in the State Court, the insanity of petitioner at the time of the act complained of, was conceded by the Court, which, declining to hear any charge of misconduct as urged by the Bar Committee, entered the disbarment, not for any wrongdoing, but despite said insanity.

The State has other means than disbarment for the care of the insane and to protect the public. Already in 1935 the petitioner, realizing his enfeebled condition, had voluntarily withdrawn from the faculty of the Tulane Law School, where purely as a labor of love for the profession which he cherished, he had contributed sixteen years of part-time teaching of major subjects. From 1936 and for ten years thereafter, petitioner was constantly hospitalized and treated in various institutions. In 1948, completely restored to physical and mental health, he for six years thereafter practiced law unremittingly, arguing thirty-seven cases in the Louisiana Supreme Court and the Orleans Court of Appeal, with not one word of doubt, criticism or objection from the public generally or any Judge or attorney in the State. In 1954, despite his complete recovery and his renewed, unexceptionable profes-

sional activity, he was disbarred by the State Supreme Court, for an act committed in 1935, as to which the Supreme Court conceded his insanity and lack of willful wrongdoing at that time.

This State decision is the sole cause of action presented against petitioner in the instant proceeding for his disbarment in the Federal Court, and as a cause of action in this Court, it is clearly insufficient.

(2)

At page 9 of his brief, the Solicitor General says that the State Court decision on the statute of limitations was an authoritative pronouncement of State law binding in the Federal Court.

But the first requirement for the application of that doctrine is that there must have been a considered decision by the State Court on the point. The State Court in its opinion (State v. Theard, 222 La. 328, 62 So. (2d) 501), in a few vague remarks indicating that it believed that petitioner's plea had been limited to a charge of laches, did say that "our law of prescription is purely statutory", but did not even refer to Article 3544 of Louisiana Civil Code providing that, in every civil matter not subject to a special prescription, the prescription of that Article (ten years) shall apply.

Under Federal jurisprudence, where the cause of action is subject to be extinguished by prescription, the State statute applies and will be enforced by the Federal Court.

Michigan Ins. Bank v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690; 32 L. Ed. 1080;

Stewart v. Bloom, 11 Wall. 493, 20 L. Ed. 176;
Bank of Alabama v. Dalton, 9 How. 522, 13 L. Ed. 242.

The Solicitor General, at page ten of his brief, says that the delay in bringing the disbarment suit did not prejudice petitioner's defense.

A delay of **seventeen years**—from 1936 when petitioner was hospitalized to 1952, when the State suit was started—and **of nineteen years** to 1954, when the present action was instituted, during the first ten years of which period petitioner was confined uninterruptedly as a patient and inmate in mental hospitals and completely removed from his former affairs and from all types of business activity whatsoever,—unquestionably and inevitably produced enormous and far-reaching changes in every aspect of petitioner's life. During that long period, petitioner's two professional associates died, as did petitioner's parents and, with one exception, all petitioner's other close relatives; his office and personal records were dispersed or destroyed, his books for the most part lost or stolen.

It is because of this unquestioned effect of inordinate delay in the pursuit of all matters, that doctrines of limitation necessarily came into being and were ultimately translated into every system of law. Statutes of limitation are statutes of repose. They are essential to the welfare of society. It is an axiom that the lapse of time constantly carries with it the destruction and disappearance of all means of proof. The public as well as individuals are interested in the principle upon which statutes of repose are based.

In the present case, the prescription or limitation of ten years was applicable, and the present action brought nineteen years after the act complained of, should have been dismissed for that reason.

(3)

The Solicitor General, also at page 9 of his brief, likewise argues that, since the State Court disbarred petitioner for insanity, whereas the State Constitution and the Rules of the Supreme Court (Charter of the Integrated Bar) limit disbarment, as authorized in the Constitution, only to "misconduct" or "willful misconduct", it must be concluded that the State Court, in the exercise of its undoubted power to interpret the State statutes, decided to include "insanity" within the definition, or as a form, of "willful misconduct".

Such an argument answers itself.

Nor can the Solicitor General argue that the Louisiana Court, in the exercise of its prerogative to interpret State statutes or in recognizing and applying the reserved police power of the several states, can by such means, unreasonably and at variance with fact and logic, destroy property without due process in violation of the Fourteenth Amendment.

It rests with the Federal Supreme Court to determine finally whether a State Constitution as declared by the State Court of last resort, or whether the acts of State officers and judicial and administrative proceedings had under State authority, are or are not consistent with due process of law. This is nothing more than a restatement

of the doctrine that the states cannot conclusively make due process anything they may choose to declare such, and that the inhibition of the Fourteenth Amendment rests upon the State in all its agencies and instrumentalities.

Further, the doctrine that the Fourteenth Amendment was not intended as a restriction upon the police power of the states is subject to the qualification that measures adopted for the purpose of regulating the exercise of **property rights, such as the practice of law,** must be reasonable and have some direct, real and substantial relation to the public object sought to be accomplished, and that the governmental power is not to be arbitrarily or colorably exercised or used as a subterfuge for oppressing and persecuting **any particular individual.**

Justice Frankfurter *(Barsky v. Board of Regents,* 347 U. S. at page 470; 98 L. Ed. 849, 74 Sup. Ct. 665):

> "It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession . . . (p. 471). The limitation against arbitrary action restricts the power of a State 'no matter by what organ it acts'."

And Justice Douglas (with Justice Black concurring) *(Barsky v. Board of Regents,* 347 U. S., at page 472); 98 L. Ed. 850, 74 Sup. Ct. 666, said:

> "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed

as much right to work as he has to live, to be free, to own property. . . . The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. The Bill of Rights prevents a person from being denied employment who . . . . is wholly innocent of any unlawful purposes or activity. Citing Wieman v. Updegraff, 34 U. S. 183 . . .(p. 474)."

Shepard v. Thompson, 122 U. S. 231, 30 L. Ed. 1156;

Sheft v. Miller, 2 Wheat. 216, 4 L. Ed. 248;

Bealtz v. Burns, 8 Cranch. 98, 3 L. Ed. 500.

The argument of the Solicitor General that the right of a lawyer to practice is only a privilege to be granted or withheld at the discretion of the licensing authority, overlooks the established doctrine that a lawyer's right to pursue his profession constitutes property protected by the due process clause of the Fourteenth Amendment, and of which the lawyer cannot be deprived for any whimsical, capricious or unreasonable cause.

(4)

The Solicitor General claims at page 10 of his brief that insanity was a proper reason for removing petitioner from the practice of law. He adds that petitioner has never been found to be insane at the time of the act complained of. He urges, in any event, that no constitutional right was violated by the disbarment on the ground of insanity; and he concludes that petitioner was properly disbarred by the Federal District Court since he had been disbarred by the State in which said Federal Court sits.

As already shown in the present reply brief and also in petitioner's brief on the merits here, this hydra-headed attack of the Solicitor General clearly violates fundamental principles for the protection of **property** under the due process clause of the Fourteenth Amendment.

The alleged valid exercise of the police power does not lessen the power and duty of this Court to determine for itself whether a state statute, as interpreted by the State Court, violates the 14th Amendment.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18;

Brebanan v. Warley, 245 U. S. 60, 62 L. Ed. 149, 38 Sup. Ct. Rep. 16;

Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441, 35 Sup. Ct. Rep. 240.

The State disbarment decision (Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310) certainly adjudged the insanity of petitioner in the year 1935, as it conceded it for the purpose of its disbarment decree, holding that, despite said insanity and excluding the claims of the Bar Committee, petitioner must be disbarred for an act said to have been committed on January 2 of that year.

The real thought of the Solicitor General, as he has urged it over and over again, is that the right to practice law is a privilege which a Court can grant or withhold. The difficulty with that theory is that, under the settled jurisprudence of this Court, the right to practice law constitutes **property**, in the retention and enjoyment of which the lawyer must be protected, under the Fourteenth Amendment, to the same extent as in the use and enjoy-

ment of any other type of property. See the decisions in petitioner's Brief on the Merits, pages 15 to 18.

Indeed, a recent decision of this Court has settled that even the desire to enter into the practice and to obtain a license is a right protected by law and which cannot be thwarted by legislative or judicial blocks which are unreasonable and bear no substantial relation to the desired status. *In re Levy*, 348 U. S. 978, 99 L. Ed. 762, 75 Sup. Ct. Rep. 569; same case below 214 Fed. (2d) 331.

A mental breakdown which disabled petitioner for more than ten years, and from which he has now, nearly twenty-one years later, happily fully recovered, as demonstrated by his very active practice from 1948 to 1954 and by his conduct alone of the present suit from its incipiency,—offers no substantial support justifying the objection of the Solicitor General to petitioner's desire to continue to pursue his life's work as an attorney at law.

(5)

Wieman v. Updegraff, 344 U. S. 183, 97 L. Ed. 216, 73 Sup. Ct. 215, in refusing to remove from public employment certain professors who were ignorant of the subversive objectives and nature of an organization which they had innocently joined, is complete and controlling authority in the present case for the proposition that, "indiscriminate classification of innocent with knowing action must fall as an assertion of arbitrary power. . . . It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory".

At page 11 of his brief, the Solicitor General declares that, in his view, that case and the dissenting opinions of Justices Black, Frankfurter and Douglas in *Barsky v. Board of Regents*, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650 are not comparable in importance, to the case now before this Court. In the *Wieman* case, this Court said:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on a disloyalty ground. In the view of the community, the stain is a deep one, indeed it has become a badge of infamy."

How strikingly parallel and, as we believe, even more serious and damning is a charge of professional misconduct resulting in disbarment; and how unjust, unreasonable and grievous to the former lawyer is such a decree when based not on conscious or willful misconduct but (excluding all other considerations as the State Court did in the present case) on a conceded mental breakdown which, as the same Court decided in a companion case already mentioned (State v. Theard, 212 La. 1022, 34 So. (2d) 248), did not involve any intentional or deliberate act but resulted from an unfortunate condition of serious illness which was beyond the lawyer's control at the time of the acts complained of.

(6)

The Solicitor General argues at page 12 of his brief that, as a matter of "judicial administration" it would be unwarranted, *i. e.*, undesirable in the view of the Solicitor, for a Federal Court to overturn the judgment below on the ground of abuse of judicial discretion.

We are not asking this Court to reverse the Court of Appeals or the Federal Judge on that ground.

It seems plain that the judgment of the District Court merely reflected the error of that Court's reliance on the validity of the judgment in the State Court; whereas it is patent, as we submit, that disbarment for conceded insanity, eliminating all other reasons or causes, is a deprivation of the lawyer's **property right in violation of the Fourteenth Amendment.** It is submitted that no such State Court decree can support a valid decree in this Court.

As already noted, the State has other means of taking care of those who through mental deterioration and breakdown are unable to take care of themselves or might become dangerous to the public. Happily, no such trouble has occurred in petitioner's case. It may be noted here that, for the full period of petitioner's illness, as well as during the previous years of his life, his mental condition reflected no personal eccentricities, conditions of contempt and abuse of Courts, opposition to the Government of our Country or leaning towards or adherence to any political theories or groups or movements properly under public condemnation in this country.

And this properly brings up the incontestable point that the Federal District Court and the United States Court of Appeals for the Fifth Circuit did not and could not change the cause of action as selected and presented by the United States Attorney. His motion asked for petitioner's disbarment in the Federal Court, for the sole reason that by a State Court decree which he attached, petitioner had been disbarred.

The case must stand or fall on that cause of action. The Court could hardly claim that proper judicial administration should not permit the reversal of the judgment of the District Court, as the Solicitor General abandoning the sole cause of action presented by the United States Attorney's motion herein, now suggests.

(7)

Also at page 12 of his brief, the Solicitor General says that the several Federal District Courts have adopted, each in its own District and in its discretion, different rule-patterns as to the method of disposal of disbarment decrees coming to them, as in the present case, from the State Courts.

A monograph prepared by the Department of Justice and no doubt of real value on this interesting subject, covers many pages of the Solicitor General's brief herein and is the basis for an informative and useful statistical table indicating the variations on the subject in eighty-three District Courts of the Federal Judicial System.

However, in *Selling v. Radford*, 242 U. S. 46, which the Solicitor General cites several times in his brief, it is settled that, as long as an overall rule such as we think the Solicitor General favors is not adopted, each Federal Court, in view of its own inherent powers, when the matter is not controlled by statute or the Federal Rules of Civil Procedure, is at liberty to make its own rules.

It goes without saying that the present case is controlled by the existing Rule in the Eastern District of Louisiana, reproduced in the brief of the Solicitor General, page 2.

The rule to show cause necessarily imports that the decree of the State Court is presented as the cause of action on which exclusively the motion of the United States Attorney is based.

That perforce is the only issue presented in the present case.

REPLY TO THE BAR COMMITTEE'S BRIEF.

(8)

The State Court decree, if it has any basis whatever, must rest on the plain statement of the State Court which, declining to consider any other charge or claim of the Bar Committee, **conceded the insanity** of petitioner at the time of the commission of the act complained of; the Court declaring that it made no difference "whether the dishonest conduct stems from an incapacity to discern between right and wrong, or was engendered by a specific criminal intent".

No one can add to this judgment, anything which the State Court declined to consider.

The Bar Committee, by its exception to the Master's Report, has emphasized the Court's refusal to include in its decision any charge of willful or felonious misconduct on the part of petitioner.

(9)

The Bar Committee, confronted with the ruling in State v. Theard, 212 La. 1022, 34 So. (2d) 248, that the acts of petitioner were **not intentional and deliberate** but occurred by reason of an unfortunate circumstance over which petitioner had no control, finds nothing to say, ex-

cept that that case and the State disbarment case are different.

Yet the acts in that case and in the disbarment case were exactly of the same nature, said to have been committed by petitioner at practically the same time, and the illness of petitioner prevailed throughout.

These two decisions of the same Court, especially in a jurisdiction where disbarment is limited by the State Constitution to "willful misconduct", demonstrate that the decree of disbarment of petitioner depriving petitioner of his right to practice law because he had been mentally ill some nineteen years previous, was whimsical, unreasonable and arbitrary, and, in clear violation of the Fourteenth Amendment, deprived petitioner of his **property right without due process of law.**

—o—

It serves no purpose for the Bar Committee to deny petitioner's insanity. That issue is out of this case. It passed out of the case, when the State Court, putting aside the Committee's charge of felonious conduct, and conceding insanity for the purpose of the judgment of disbarment, decided that, despite the insanity of defendant, a judgment of disbarment would be entered **on account of insanity.**

Inevitably, when the present case was instituted in the Federal Court solely on said State judgment as rendered, the only issue presented was the judgment itself. How can the Bar Committee in good faith now undertake to present any other issue by trying to add anything to the State Court judgment on which alone the United States

Attorney brought suit herein, especially when that very claim of the Bar Committee was put aside by the State Court which, in its judgment, chose instead to concede the **insanity** of petitioner for the purpose of its decision.

Petitioner, whose position and defense have been at all times constant, consistent and well founded in law, now requests and prays, for the reasons set forth in his previous briefs herein and in the present brief, that the judgment herein of the Circuit Court of Appeals for the Fifth Circuit be reversed and that the rule to show cause of the United States Attorney in the District Court in this cause be denied and discharged, and that petitioner, never found guilty of misconduct by any court, be protected under the Fourteenth Amendment, in his property right to practice his profession.

Respectfully submitted,

DELVAILLE H. THEARD, Petitioner,
In Propria Persona.

CERTIFICATE.

Copies of the foregoing reply brief have been served on J. Lee Rankin, Solicitor General of the United States, and on Louisiana State Bar Association, by depositing said copies in the mail, duly addressed, postage prepaid, at New Orleans, La., on December 7, 1956.

New Orleans, La., December 7, 1956.

DELVAILLE H. THEARD